NTSB Order No.
EM-130

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION BOARD
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of April, 1986

JAMES S. GRACEY, Commandant, United States Coast Guard

vs.

THOMAS J. PURSER, Appellant.

Docket ME-115

OPINION AND ORDER

Appellant, by counsel, challenges a May 6, 1985 decision of the Vice Commandant (Appeal No. 2390) affirming a suspension of his merchant mariner's document (No. 121 7281) and license (No. 46590) for three months on twelve months' probation as ordered by Coast Guard Administrative Law Judge Archie R. Boggs on August 17, 1984 following an evidentiary hearing completed on June 8, 1984.[1] The law judge had sustained a charge of negligence based on specifications alleging, first, that appellant, while serving as master aboard the tug M/V SATOCO on March 18, 1984 in the vicinity of lighted buoy #9 in the Mobil Ship Channel had

> "fail[ed] to navigate the M/V SATOCO at a safe speed adapted to the prevailing circumstances and conditions of fog and restricted visibility, when, from radio transmissions, [he was] aware of the proximity and approach of another vessel, which contributed to the collision of the M/V INTREPID and the T/B CHROMOLLOY I being pushed by the M/V SATOCO.

and, second, that he had

> "failed to maintain the proper lookout on the [M/V SATOCO], which contributed to the collision of the M/V INTREPID and the T/B CHROMOLLOY I being pushed by the M/V SATOCO."

On appeal to the Board the appellant contends that the law judge and the Vice commandant erred in finding that the specifications

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[1]Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

had been proved by the evidence in the record.[2] For the reasons stated below, we disagree and will sustain the Coast Guard decision.

As to the first specification, appellant does not deny that it would have been negligent or unsafe, given "the prevailing circumstances and conditions of fog and restricted visibility" and "the proximity and approach of another vessel," to have maintained a speed of 7 to 10 knots through the area in which the collision occurred.[3] Rather, he contends that there is no evidence to support a conclusion that his vessel was proceeding at such an excessive rate of speed. We find no merit in respondent's contention. While he may disagree with the decision not to credit the testimony of the witnesses, namely, the appellant himself and the pilot on the bridge with him, who testified that the SATOCO'S speed was somewhere between three and a half and five knots, there was ample evidence, in the form of testimony from other percipient witnesses, including the operator of the vessel that collided with the tank barge appellant's vessel was pushing, on which to base a finding that the M/V SATOCO was traveling considerably faster, that is, closer to ten knots. See hearing transcript at pp. 139, 166, and 193. In such circumstances, Appellant's challenge to the finding as to his vessel's speed is in effect an attack on the law judge's credibility assessment with respect to the conflicting testimony of numerous witnesses who undertook to provide an estimate of the tug's speed before and during the relevant time frame. That the conflicting evidence on the issue of appellant's vessel's speed could have been weighed or resolved differently provides no basis for disturbing the credibility determinations in fact reached by the law judge, who, within his exclusive province as trier of fact, personally observed the demeanor of the witnesses as they testified, and whose judgment, based on such observation, should not be overturned, as the Vice Commandant ruled, unless inherently incredible. Nothing in the appellant's brief persuades us that the Vice Commandant erred in accepting the law judge's resolution of the conflicting testimony on the issue of the SATOCO's speed.

With respect to the second specification, the appellant appears to concede that he committed a "technical violation" of the

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[2]The Coast Guard has filed a reply brief opposing the appeal.

[3]The 520-foot steel tank barge, the CHROMOLLOY I, that the 138-foot tug was pushing was loaded with roughly 230,000 barrels of gasoline and jet fuel. The M/V INTREPID is a 165-foot long off-shore supply vessel.

rules concerning a proper lookout in that at the time of the collision and designated lookout was not on watch, having been directed by appellant to leave the bridge and remove a dog from the towing winch in order to ease the tension on the wires securing the barge to the tug, and no one unencumbered by other duties was acting as lookout in his absence. Appellant maintains, nevertheless, that any technical violation that may have occurred should be excused because of the asserted necessity to send the second mate below to slacken the wires at that point and that, in any event, the failure to keep a designed lookout continuously on watch was not negligence since those remaining on the bridge, appellant, who was at the helm, and the pilot, who was monitoring the radar, were capable of providing an adequate and proper lookout and, given the prevailing restricted visibility, no number of additional watchstanders would have enabled the vessel to avoid the collision.[4] We think this specification, like the first, supports the charge of negligence.

Appellant's contention that the collision would have occurred even if the designated lookout had remained on the bridge is not relevant to the issue of negligence in connection with his responsibility as master of the vessel.[5] As the Vice Commandant recognized, the appropriate standard of care, not causation, is determinative of the question of negligence here. Appellant was properly found to be negligent under the specification if "a reasonably prudent person of the same station, under the same circumstances" would not have acted as he did. See 46 CFR §5.29 (1985). We find no error in the law judge's conclusion that a prudent mariner would not have so acted. The appellant chose to have his lookout perform another task under conditions that dictated that more, not less, vigilance was required. He was aware of the approach of the INTREPID, and apparently concerned enough about passing that vessel in the fog to ask it to navigate outside of the buoyed channel. Although that vessel had not been sighted either visually or on radar, appellant sent his lookout to tend to the towing winch without replacing him with an available crewmember. While it may have had no bearing on the subsequent collision, we think the law judge could fairly conclude that appellant's judgment was deficient in that he unnecessarily compromised his vessel's ability to avert a collision not withstanding the known risk of colliding with the as yet unlocated

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[4]At the time of the collision the visibility was limited to just a few feet forward of the tank barge. In other words, forward visibility from the bridge of the tug was about 500 feet.

[5]This factor would, we assume, be relevant in determining whether appellant's vessel was at fault in a liability context.

INTREPID as it proceeded up the channel toward the SATOCO flotilla.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The three-month probationary suspension of appellant's license and document ordered by the law judge and affirmed by the Vice Commandant is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman and LAUBER, Member of the Board, concurred in the above opinion and order.